SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term 1969

No. 510

FLORIDA CITRUS EXPOSITION, INC.,
also known as
FLORIDA CITRUS SHOWCASE, INC.,
Petitioner,

vs.

HUNGERFORD CONSTRUCTION COMPANY,
a Michigan corporation; and
CONTINENTAL CASUALTY COMPANY,
an Illinois corporation,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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FREE PRESS PUB. CO., INC. - TAMPA, FLORIDA

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IN THE

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HUNGERFORD CONSTRUCTION COMPANY,
a Michigan corporation; and
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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on April 22, 1969.*

Citations To Opinions Below

The opinion below is unreported and is printed in the appendix hereto, infra, pages 16-24.

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* Note: All emphasis supplied.
"R" means certified Transcript of Appendix used in lower court.
"ST" means certified Supplemental Transcript which contains all testimony except exhibits.
"A" means Appendix hereto.
The Petitioner will be called "Owner" and Respondent "Contractor."

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on April 22, 1969 (A 23, infra). The jurisdiction of this Court is invoked under *28 U.S.C., Section 1254(1)*.

WHETHER—

THE DECISION OF THE LOWER COURT CONFLICTS WITH DECISIONS OF THIS COURT, OF CIRCUIT COURTS OF APPEALS, AND OF THE SUPREME COURT OF FLORIDA, BY HOLDING THAT A LIQUIDATED DAMAGES PROVISION FOR FAILURE TO COMPLETE A BUILDING WITHIN A FIXED TIME, THOUGH VALID WHEN THE CONTRACT WAS MADE, BECAME A PENALTY AFTER DELIVERY TO THE OWNER, WITHIN SUCH FIXED TIME, OF THE BUILDING IN A SUBSTANTIALLY INCOMPLETE CONDITION, ON THE GROUND THAT THERE WAS NO DELAY IN DELIVERY OF THE BUILDING AND THE OWNER DID NOT PROVE THAT THE ACTUAL DAMAGES ARISING FROM INABILITY TO USE THE FAULTY BUILDING FOR CERTAIN USES CONTEMPLATED BY THE PARTIES WERE PROPORTIONATE TO THE AMOUNT OF STIPULATED DAMAGES.

STATEMENT

Suit was filed in the United States District Court for the Middle District of Florida by Hungerford Construction Company (hereinafter called "Contractor") against Florida Citrus Exposition, Inc., also known as Florida Citrus Showcase, Inc. (hereinafter called "Owner") for the balance alleged to be due under a construc-

tion contract for an exhibition building at Winter Haven, Florida (R 6-9). Jurisdiction of the District Court was invoked on the ground of diversity of citizenship (R 6). The Owner filed a counterclaim against the Contractor and Continental Casualty Company, its surety, seeking recovery of damages sustained by reason of improper construction of the building and for liquidated damages for delay in completion of the building within 180 days, as required in the contract (R 9-13). The building was to be used by the citrus industry for a citrus festival during February and March of each year, for rental to third parties desiring the building for exhibition purposes and admission was to be charged the public year round to view exhibits located in such building (ST 405-408). The building was delivered to the Owner within the 180 day completion period but was in a substantially defective and incomplete state. The dome leaked after rains, the plaster became discolored and some fell to the floor. After attempted repair by the Contractor, the leaks continued with subsequent discoloration of plaster (A 19, infra). It was necessary for the Owner to repair the dome and other parts of the building at substantial cost. The evidence showed that the Owner had to abandon the admission charge to view exhibits in the building and lost opportunities to rent the building to third parties for their use (ST 467-469).

Under appropriate charges as to what constituted "completion of the contract" and "substantial performance" thereof, the jury awarded actual damages for corrective work by the Owner in the amount of $49,500, representing 27% of the entire contract price of $185,000, and awarded $28,250 as liquidated damages (ST 1016-1018), (R 16). Because of mathematical error,

the first form of verdict was revised. An examination of the revised verdict shows the changes written in by the jury (R 16, ST 1033-1046).

The contract provided that:

> "All work under this Contract shall be completed within 180 calendar days. . . .
>
> "The amount of $200.00 (sic) per calendar day will be assessed as the fixed, agreed liquidated damages to be deducted by the Owner from the sums due under other provisions for each and every calendar day of delay in completion of the work. . . ." (R 161-162) †

The jury verdict awarded the Contractor $27,973.60 for balance due on the contract and the Owner the sum of $77,750 as damages on the counterclaim, $49,500 of which was for actual corrective costs. $28,250 was for liquidated damages, representing 113 days at $250 per day (R 16; ST 1016-1018, 1033-1046).

The jury apparently selected 113 days delay time on the basis that the building was delivered around March 4, 1965, and the Contractor and Owner did not break off negotiations for the Contractor to complete the building until approximately June 25, 1965, at which time the Owner assumed responsibility for completing the building (ST 412-418, 650-655).

The Court of Appeals held that under Florida and general law the question whether the liquidated damage provision was applicable was a question of law for

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† The provision for $200 per day for delay is inaccurate and was inserted by error, although the lower court assumed that $200 a day was the correct figure. The figure should be $250 per day (ST 443-444). The amount is not relevant, legally speaking, but mathematically it shows the jury calculated 113 days of delay at $250 a day to get the figure of $28,250 for liquidated damages.

the Court. It held, however, that since the building had been turned over to the Owner within the time period for construction, regardless of its defective and incomplete condition, there was no breach of performance on time. It held that it was error for the District Court to submit the liquidated damage provision of the contract to the jury as a basis for damages.

It further held that since the Owner was able to make use of the building in its incomplete condition, for the citrus festival which it called the "primary use" of the building, there was a question as to whether there could be liquidated damages assessed for loss of what it called "secondary uses" of the building, i.e., for rental to third parties and for charging admission to the public for viewing exhibits in such building.

It held that such loss of "secondary uses" could be proved with certainty and that the Owner must show that the amount so proved was not disproportionate to the liquidated damages of $250 a day provided for delay in completion or else only the actual damages so proved could be recovered.

The Court ordered a new trial on the question of the actual damages sustained by failure to complete, and ruled that the liquidated damage provision of the contract could not be used or considered as a basis for damages. The judgment was affirmed as to the claim of the Contractor (A 22, infra).

REASONS FOR GRANTING THE WRIT

1. Clearly, the question presented is of importance to the construction industry which plays such a significant role in our private economy and in the functioning of our government—federal, state and local.

If the decision is permitted to stand as the controlling law of the Fifth Circuit Court of Appeals with respect to liquidated damage provisions, highly important government construction contracts (which almost always contain such provisions) in the areas of national defense and outer space development will be affected in the states within the jurisdiction of the Fifth Circuit. This Court will take judicial notice that contracts for the development of facilities and equipment for such national purposes are frequently made in the States of Texas, Florida, and other states which are located within such Circuit's jurisdiction. Obviously, as this Court has emphasized, damages for breach in performing this and similar kinds of contracts are impossible of ascertainment. *United States v. Bethlehem Steel Co.,* (1906) 205 U.S. 105, 27 S.Ct. 450, 51 Ed. 731.

It also appears that the decision of the lower court is in conflict with rules and principles relating to liquidated damages as declared by this Court, by at least two Circuit Courts of Appeals and by the Supreme Court of Florida. Moreover, in its opinion the lower court misinterpreted and misapplied the very Florida decision on which it purported to rely. These conflicts will now be examined.

2. The landmark decision of this Court on liquidated damages is *Sun Printing and Publishing Assoc. v. Moore,* (1902) 183 U.S. 642, 22 S.Ct. 240, 46 L. Ed 366.

In upholding liquidated damages for failure of defendant to return a Yacht, even though its value was less at trial than the stipulated damages, this Court recognized the difference between stipulated damages for breach of a single (one) covenant of a contract as contrasted with stipulated damages for the breach of several covenants of varying degrees of importance. (46 L.Ed. 379). In the latter case, the stipulated damages may well be held to be a penalty, although valid in the former case.

This very distinction is what the lower court overlooked. The covenant of the construction contractor was full completion of the building within the time specified. The uses to which the building was to be put (whether primary or secondary use) were irrelevant. The lower court refused to recognize that the basic covenant and object of the liquidated damage provision was *completion of the building* for all and any uses to be made of it.

It erroneously held that, though the building was 27% incomplete at the end of the time period for construction, it was used by the owner (in its leaking and damaged condition) for a citrus festival and hence the liquidated damage provision could not be invoked.

It then held that the other uses of the building, rental to third persons and admission charges to the public to view exhibits in the building the year round, were secondary and, therefore, the damages flowing from such loss of use would have to be proved with certainty and shown to be proportionate to the amount of liquidated damages, or else just actual damages for such loss of use could be recovered.

These holdings were not only contrary to the law prescribed by this Court in *Sun Printing & Publishing*, supra, but also to *United States v. Bethlehem Steel Co.*,

(1906) 205 U.S. 105, 27 S.Ct. 450, 51 L.Ed. 731 (contract for making gun carriages where liquidated damages allowed even though little if any actual damages ensued from failure to deliver on time); *Wise v. United States,* (1919) 249 U.S. 361, 39 S.Ct. 303, 63 L.Ed. 647 (upholding liquidated damages of $200 per day for delay in completing two buildings on time when one building was completed and one not completed as scheduled); *Priebe & Sons, Inc. v. United States,* (1947) 332 U.S. 407, 68 S. Ct. 123, 92 L. Ed. 32 (holding that even though damages suffered are less than the damages contracted for this is not fatal to the validity of liquidated damages).

There is no way to reconcile the holdings of the lower court with the rules and principles regarding liquidated damages clearly laid down by the above decisions of this Court.

3. The Third Circuit Court of Appeals in *United States v. LeRoy Dyal Co.,* (1950) 186 F.2d 460, squarely held that neither actual damages nor proof of actual damages was required to sustain a liquidated damages provision.

A similar holding was made by the Eighth Circuit Court of Appeals in *Southwest Engineering Co. v. United States,* (1965) 341 F.2d 998. This case involved a contract to construct four radio facilities. The Court stated:

> ". . . the majority view is that proof of actual damages is not required to sustain an action for liquidated damages, unless the contract so provides . . ." (341 F.2d 1003)

The decision of the lower court is in obvious conflict with both of the above decisions.

It is also interesting to note that in *Southwest*, supra, the court called attention to the Fifth Circuit Court of Appeals' decision in *Massman Construction Co. v. City Council of Greenville*, (1945) 147 F.2d 925, and noted critically that the *Massman* decision which used the "hindsight test" to determine the validity of liquidated damages and required proof of actual damages to sustain such a provision, was the minority view.

4. The lower court held that the District Court erred in permitting the jury to consider liquidated damages.

The fundamental vice in the analysis of the lower court was its failure to recognize that provision for liquidated damages to cover delay in the completion of the building has nothing to do with how many uses are to be made of the building in a complete state. Surely, if the contractor fails to follow the owner's plans and specifications for a building and tenders a structure that is not substantially complete, there has been a breach of the covenant to deliver on time. The lower court, however, looks solely to the uses that could be made of the building, although it was found by the jury to be substantially incomplete. It then ranked as primary and secondary the uses that could be made of the building in such incomplete state and held that since the uses were of varying importance, the liquidated damages provision was really a penalty and unenforceable. It erroneously selected, because of this faulty analysis, as an analogy a Florida realty sales contract case in which a liquidated damages provision was equally applicable by the very terms of the contract to the breach of any one of several minor undertakings. The analogy was wholly misplaced.

It cited and purported to rely on one Florida decision for its ruling — *Pembroke v. Caudill,* (1948) 37 So. 2d 538, 6 ALR 2d 1395. In *Pembroke* the contract was for the sale of realty which the Florida Supreme Court said in that very opinion could not sustain a liquidated damages provision in any event because the damages to seller from a failure to purchase were not uncertain, conjectural, or speculative. Instead, it said damages were ascertainable and could be only "the profits to be realized from the sale" by the seller. (37 So. 2d 541). It cited *Smith v. Newell,* (1896) 37 Fla. 147, 20 So. 249. *Woods-Hoskins Young Co. v. Dittmarr,* (1931) 102 Fla. 1000, 136 So. 710, for this rule.

After holding this in *Pembroke,* the Florida court pointed out that the liquidated damages were not for complete failure of the buyer to accept the realty and perform the contract, but were to be paid in the event any one of a number of things were not done, including the execution of all necessary papers "within five days from the delivery or tender of abstract or title insurance commitment," or even one day's delinquency in paying the balance of the purchase money (37 So. 2d 542).

At the same time the Florida court cited a construction contract case, *Southern Menhaden Co. v. How,* (1916) 71 Fla. 128, 70 So. 1000, in which it was held that liquidated damages would be sustained because of the difficulty of ascertaining damages in such case. Although the *Menhaden* case was urged upon the lower court as the controlling Florida decision apposite to the construction contract before it, no mention was made of the *Menhaden* rule by the lower court nor was any consideration given to the decision so far as can be ascertained.

Thus, the lower court in purporting to look to Florida law selected a case involving the sale of real estate in which, to begin with, damages are deemed to be capable of ascertainment so as to exclude the propriety of liquidated damages for failure of the buyer to accept and pay the contract price. Moreover, in *Pembroke* which it erroneously selected as the applicable law, the contract provided that the same amount of liquidated damages would be paid if the buyer defaulted in any one of a number of minor particulars, including failure for one day to meet a payment on the balance due.

It is apparent that the lower court missed the real purpose and object of the provision for liquidated damages in the instant case. The provision was to be invoked for one breach, and one breach only, namely, failure by the contractor to deliver a *completed building* on schedule. It is equally true that this breach occurred, and the jury so found, when an incomplete and damaged building was delivered to the owner. The contract mentioned no occurrence, other than failure to deliver a completed building on time, as the basis for liquidated damages. The ability or inability of the owner to use the building for one purpose or many purposes should have no relation to the validity of the liquidated damages provision. The question should have been whether at the time of making the construction contract was it likely that damages for failure to complete the building on time would be difficult, if not impossible, of ascertainment. In construction contracts the Florida Supreme Court, as shown by the *Menhaden* decision, supra, upholds liquidated damage provisions because of the un-

certainty of damages in event of failure to complete construction on time. The decisions of this Court and of the Third and Eighth Circuit Courts of Appeals declare the same law, as has been shown hereinbefore, and there is no basis for saying that Florida law is different from the general law.

The conflicts created by the decision of the lower court are clear and need to be resolved by correcting the erroneous decision of the lower court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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PROOF OF SERVICE

I, J. A. McCLAIN, JR., one of the attorneys for FLORIDA CITRUS EXPOSITION, INC., also known as FLORIDA CITRUS SHOWCASE, INC., Petitioner, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 22 day of August, 1969, I served a copy of the foregoing Petition for Writ of Certiorari to the United States Court of Apepals for the Fifth Circuit, together with the Appendix, on the Respondents by mailing a copy in a duly addressed envelope, postage prepaid, to their respective attorneys of record, as follows: Anthony S. Battaglia, Esq., of Parker, Battaglia & Ross, Post Office Box 12078, St. Petersburg, Florida 33733, and to Raymond J. Malloy, Esq., 424 South MacDill Avenue, Tampa, Florida 33609.

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Attorneys for Petitioner

CORRECTED

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 26426

HUNGERFORD CONSTRUCTION COMPANY
and CONTINENTAL CASUALTY COMPANY,
Appellants,

versus

FLORIDA CITRUS EXPOSITION, INC.,
also known as FLORIDA CITRUS SHOWCASE, INC.,
Appellee.

Appeal from the United States District Court for the Middle District of Florida

(April 22, 1969)

Before PHILLIPS*, BELL, and MORGAN, Circuit Judges.

BELL, Circuit Judge: The litigation giving rise to this appeal had to do with the construction of a building at Winter Haven, Florida. The building, which was to

*Of the Tenth Circuit, sitting by designation.

serve as an exhibition center for the citrus industry, had a poured concrete dome 170 feet in diameter as its roof. The dome was designed to be waterproof without independent waterproof covering. It developed that cold joints were formed in the process of pouring the concrete for the dome. The result was that the dome leaked and the acoustical plaster on the under surface of the dome was damaged. The damaged plaster was replaced by the contractor but subsequent leaks left it in a discolored condition.

The contractor sued for the balance due on the contract price. The building owner filed a counterclaim against the contractor and its surety, seeking recovery of damages alleged to have been sustained by reason of the improper construction of the dome.

The evidence was sufficient to make a jury question on improper construction through the formation of the cold joints.[1] The jury returned a verdict in the full amount claimed by the contractor as the balance due on the contract, $27,973.60. The building owner was awarded the sum of $77,750.00 as damages on the counterclaim. The contractor and its surety appeal.

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[1]The contractual responsibility of the contractor with respect to the dome was as follows:

> "The contractor shall be responsible for the work and every part thereof, and, since by its very nature the future soundness of the dome structure will depend on the integrity of the concrete pour, all precautions must be taken by the contractor in this regard so that the end result will be in conformity with the drawings and as described in the specifications."

There are four assignments of error. First, a part of the damages awarded on the counterclaim rested on a liquidated damages provision in the contract. Appellants contend that this provision was not applicable under the facts. Second, it is urged that the evidence which formed the basis of that portion of the award of damages stemming from the defect in the dome and for the cost of remedying the defect and the damage to the acoustical tile did not meet the standard of reasonable certainty as to causation or amount. Without reciting this evidence, we think it sufficient to say that it was adequate and therefore this assignment of error is rejected. We likewise reject the contention that the owner was barred by the failure to mitigate damages. This contention is not sustainable by the facts. Lastly, it is claimed that reversible error was committed by the court in permitting the jury to be re-empaneled for the purpose of correcting an arithmetical error in the verdict after it had been discharged. The verdict for the owner on the counterclaim was increased from $49,500.00 to $77,750.00 in the corrective process. We reverse on the first assignment of error as to damages on the counterclaim and for that reason the decision on the jury question will be pretermitted. We affirm as to the award to the contractor.

The contract required that all work under the contract be completed in 180 calendar days and that liquidated damages in the amount of $200.00 per calendar day of delay would be assessed thereafter.[2] It was un-

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[2]The contract provides in pertinent part:

"All work under this Contract shall be completed with-

disputed that the building was delivered to the owner within 180 days and that it was in continuous use thereafter. The owner contended that the liquidated damages clause was nevertheless applicable because of loss of secondary use due to the roof leak. The liquidated damages question is vital because, as stated, a part of the sum awarded the owner by the jury was necessarily for liquidated damages since the total exceeded the proof of actual damages.

The gist of the testimony regarding diminution in use from the leaking roof was as follows. From the beginning, after heavy rains, the plaster became discolored and some fell to the floor. The damaged plaster was replaced by the contractor but the leaks continued with subsequent discoloration of plaster. The building was to be used by the owner mainly for a year round office and for a citrus festival during February and March. The testimony was that the building was fully occupied on schedule by the owner for its use and that it was thereafter continuously so occupied. In addition, as a secondary use, the owners had hoped to make

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in 180 calendar days. . . . A penalty will be invoked for later completion. . . .

* * *

"The amount of $200.00 per calendar day will be assessed as the fixed, agreed liquidated damages to be deducted by the Owner from the sums due under other provisions for each and every calendar day of delay in completion of the work beyond the expiration time above specified and as provided." (App. 161, 162)

The sum of $200.00 was treated as $250.00 throughout the trial by the court and counsel. The correctness vel non of the figure is not relevant to our disposition of the appeal.

it available on a rental basis to others who might want to use it for exhibition purposes. The only testimony as to loss of secondary use was that the owners hoped to charge a year round admission fee to those wishing to see the building but the claim was that this idea was abandoned because of the unsightly plaster. There was also testimony that the owners lost an opportunity for the same reason to rent the building on one occasion for an automobile dealer's exhibition or show.

In our view of the Florida law the court erred in submitting the liquidated damage provision of the contract to the jury as a basis for damages. Submission would have been entirely proper had the building not been delivered on schedule. The provision was, however, a penalty clause when allowed as a basis for damages for loss of secondary use under the facts here.

The court recognized that under the Florida law the question whether the liquidated damages provision was applicable, or whether it was to be construed as a penalty and thus be inapplicable, was a question of law for the court. See *Pembroke v. Caudill,* Fla. Sup. Ct. 1948, 37 So.2d 538, 6 ALR 2d 1395. In that case the court went on to say:

> ". . . in the final determination of the question whether or not a stipulation should be construed as providing for a penalty or for liquidated damages the guiding principle for the courts to observe should be that of 'just compensation' for injury resulting from the breach of the contract, and the controlling ob-

> ject should be to place the injured party in as advantageous position as he would have occupied had his contract not been broken. So long as the contracting parties keep this principle in view the courts will very generally allow them to agree upon such a sum as will probably be the fair compensation for the breach of a contract. But when they go beyond this, and undertake to stipulate, not for compensation, but for a sum entirely disproportionate to the measure of liability which the law regards as compensatory, the courts will refuse to give effect to the stipulation and will confine the parties to such actual damages as may be pleaded and proved."

Using this statement of the Florida law as a test it becomes apparent that under the circumstances here the provision in question amounts to a penalty. We deal only with the question of loss of secondary use. The testimony was clear that the building was available to the owner for the primary use. The evidence as to loss of secondary use was entirely speculative. One auto show may have been lost but there is no evidence as to the amount of rent which would have been realized out of this transaction or whether the loss occurred during the period in suit. The only other loss of use claimed was in the form of a daily admission charge to the public to see the building and its contents The proof demonstrated only that this use did not rise above a suggested use. In any event, such loss of secondary use as there may have been is capable of proof. The proof that was offered was entirely disproportion-

ate to the sum of $200.00 or $250.00 per day. It is thus clear that the claim for liquidated damages was far in excess of such compensatory damages as would be indicated from the slight deprivation of secondary use claimed by the owner.

The case is left in this posture. There must be a new trial on the question of the damages sustained by the owner. The liquidated damages provision of the contract cannot be used as a basis for damages. The judgment is affirmed as to claim of the contractor.

AFFIRMED in part; REVERSED and REMANDED in part for further proceedings not inconsistent herewith.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1968

No. 26426

D. C. Docket No. CA 65-363

HUNGERFORD CONSTRUCTION COMPANY and CONTINENTAL CASUALTY COMPANY,

Appellants,

versus

FLORIDA CITRUS EXPOSITION, INC., also known as FLORIDA CITRUS SHOWCASE, INC.,

Appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before PHILLIPS*, BELL and MORGAN, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part, and reversed and remanded in part, in accordance with the opinion of this Court;

It is further ordered that appellants be condemned to pay one-half of the costs in this Court, and appellee be condemned to pay one-half of said costs.

April 23, 1969

*Of the Tenth Circuit, sitting by designation.

Issued as Mandate: JUL 10 1969

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U. S. COURT OF APPEALS
FILED
JUN 25 1969
EDWARD W. WADSWORTH
CLERK

No. 26426

HUNGERFORD CONSTRUCTION COMPANY
and CONTINENTAL CASUALTY COMPANY,

Appellants,

versus

FLORIDA CITRUS EXPOSITION, INC.,
also known as FLORIDA CITRUS SHOWCASE, INC.,

Appellee.

- - - - -

Appeal from the United States District Court for the
Middle District of Florida

- - - - -

(June 25, 1969)

ON PETITION FOR REHEARING

Before PHILLIPS*, BELL, and MORGAN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby Denied.

*Of the Tenth Circuit, sitting by designation.

SUPREME COURT, U. S.

FILED
SEP 12 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term 1969

No. [redacted] 588

FLORIDA CITRUS EXPOSITION, INC.
also known as
FLORIDA CITRUS SHOWCASE INC.,
Petitioner and
Cross-Respondent,

vs.

HUNGERFORD CONSTRUCTION COMPANY
a Michigan Corporation; and
CONTINENTAL CASUALTY COMPANY
an Illinois Corporation,
Respondents and
Cross-Petitioners.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Cross-Petitioners.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Cross-Petitioners and respondent respectfully pray that this court grant this cross-petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on April 22, 1969.*

*Respondents and Cross-Petitioners will use the same references used in the Petition for Writ of Certiorari and reply thereto:
"R____" refers to certified Transcript of Appendix used in the lower court.
"ST____" refers to certified Supplemented Transcript which contains all testimony except exhibits.
"A____" refers to Appendix to petition.
Petitioner and Cross-Respondent will be referred to as "Owner"; Respondents and Cross-Petitioner will be referred to collectively as "Contractor".

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 410 F.2d 1229.

QUESTION PRESENTED FOR REVIEW

WHETHER THE DECISION OF THE LOWER COURT IN A DIVERSITY CASE WHICH HELD EVIDENCE OF THE CAUSE OF DAMAGE AND THE AMOUNT OF DAMAGE BASED ON ESTIMATES AND APPROXIMATIONS AND INCLUDING INSEPARABLE AMOUNTS NOT ATTRIBUTABLE TO CONTRACTOR IS IN CONFLICT WITH APPLICABLE LAW OF THE STATE OF FLORIDA.

JURISDICTION

The Judgment of the Circuit Court of Appeals was entered on April 22, 1969 and Issued as Mandate on July 10, 1969. The jurisdiction of this court is invoked under 28 U.S.C. Section 1254(1).

STATEMENT OF THE CASE

The statement of this case appears in the petition filed by the Owner and as corrected in the brief of Contractor. Only such additional statement as is necessary on this cross-petition will be set forth herein.

The damages the Owner sought to prove in this case were in two areas only: 1) damages to remedy leaking of water through a concrete roof in the shape of a dome and 2) damages to acoustical plaster on the undersurface of the concrete roof. (R 123, 124) (ST 975, 976)

On the issue of the certainty of the cause and the responsibility for the leaking of water through the concrete, the following evidence is considered material to cross-petition. There was no waterproof covering designed to go over the concrete roof. (R 57, 59; ST 311, 333) It was anticipated by the design engineer that the concrete forming the roof might crack. (R 90-91; ST 707-708) Cracks would allow water to pass through. (R 55; ST 139) Finally, the concrete mix for the roof contained 48.6% expanded shale called Holite which is a porous coarse aggregate included in the concrete which formed the roof. (R 103, 109, 118, 180, 183; ST 758, 895-904)

Additionally, on the issue as to the certainty of the cause of damages an inseparable amount of the Owner's damages were the result of numerous blisters that appeared in a neoprene hypalon covering placed over the dome by a contractor, Nationwide Painting Company, hired by the Owner after Contractor had left the site and this litigation had commenced. Nationwide improperly applied the covering. The blisters had to be removed by cutting them out and the spots left patched with flashing cement. (R 79-80, 107; ST 462-463, 811) These blisters were not the responsibility or fault of the Contractor.

The evidence submitted by the Owner included some unascertained amount for the removal of the blisters and the patching. It was possible to separate these damages for removal and patching of blisters, however, the witness making the estimate for the Owner had not made a sufficient enough study to indicate what portion of the total damages were related to the removal of the blisters caused by Nationwide Painting Company. (R 108; ST 835)

On the question as to the certainty of damages, the following evidence is considered material to this cross-petition. The evidence as to the amount necessary to cover the dome to prevent leaking was "in the vicinity, approximately of a dollar a square foot." (R 105-106; ST 801) Also, as mentioned above, the total amount of damages designed to correct the leaking of water through the dome contained an inseparable amount attributed to defective work performed by Nationwide Painting Co.

The evidence as to the amount necessary to correct the damages to the acoustical plaster on the undersurface of the roof was based on an estimate made by a man looking at the ceiling from the ground with a pair of field glasses (R 93-94; ST 737-738), although a determination as to whether all the acoustical plaster had to be removed or whether some could remain could not be made without a close inspection. (R 95; ST 740) The dollar amount of the estimate was "somewhere in the neighborhood of $3.50 to $4.00 a yard to apply." (R 97; ST 742) In addition, the estimate given and the damages awarded included an amount for removal of all the existing acoustical plaster. As to the dollar amount required for removal, the estimator first said he would not give a definite quote because it was an unknown factor. (R 98; ST 742) Later, the estimator indicated an estimate of $2.00 a yard to remove. (R 99; ST 742) No bids were obtained by the witness for a basis for his estimate. (R 100; ST 753)

The lower court found without reciting the evidence it was relying on that the evidence was adequate to support the verdict. (A 18)

REASONS FOR GRANTING THE WRIT

1. **The decision of the lower court in finding the proof adequate as to the cause and amount of damages conflicts with the applicable law of the State of Florida.**

The dome roof contained cold joints which were caused to appear by the Contractor in the pouring of the concrete. These could or could not allow water to pass through. (ST 143) There is no evidence to show that the leaking complained of is solely related to these cold joints. In addition, there are three other sources of leaking which would not be attributable to the Contractor: 1) anticipated cracks in the concrete; 2) the concrete was porous; 3) there was no waterproof covering designed or required to cover the concrete.

The applicable law of the State of Florida is set forth in the case of *Equitable Fire & Marine Insurance Co. v. Tiernan Building Corporation* (Fla. App. 1966), 190 So.2d 197, which case cites opinions of the Supreme Court of Florida. That case reversed a judgment in favor of an owner against a contractor because there was no evidence as to the cause of a leak in a roof and additionally because the proof of damages was based on a formula and there was no proof the expense was waived. The facts are similar to the present case.

Contractor maintains that the proof in the *Tiernan case,* supra, was in excess of that in the present case, but was insufficient according to the law of Florida to justify an award of damages and therefore decision of the lower court in this case conflicts with law of Florida as set forth in that case.

In the case of *Tolin Manufacturing Corp. v. Roy Feiner Handbags, Inc.*, 173 So.2d 714 (Fla. App. 1965), the court reversed a jury verdict awarding damages for a breach of contract because the testimony as to damages consisted entirely of approximations and estimates. In reaching this decision, the court cited decisions of the Supreme Court of Florida.

In the present case, all of the evidence is based on "approximations and estimates" and there is no certainty as to either of the estimates.

The Fifth Circuit Court of Appeals has recently required a new trial on the issue of damages applying Florida law in a diversity action. *Center Chemical Company v. Avril, Inc.*, 392 F.2d 289 (5 Cir. 1968). The court said:

> ". . . There can be no recovery under Florida law where the evidence is not sufficient to enable the jury to assess damages with a reasonable degree of certainty without leaving the amount awarded to speculation and conjecture . . ."

392 F.2d at page 290.

In the present case, the evidence was so lacking that the jury had to speculate as to the amount to be deducted from the estimate for covering the dome for removal of blisters and patching the holes left by the removal. The jury had to speculate as to whether all of the acoustical plaster had to be removed. Also the jury had to speculate as to the cause of the leaking. Because of these deficiencies in the proof the jury verdict could only be based on speculation and conjecture and the judgment of the trial court should have been reversed.

It has also been declared by the Supreme Court of Florida that the evidence must provide a predicate on which a definite sum of damages can be awarded. *Florida Ventilated Awning Co. v. Dickson,* 67 So.2d 215 (Fla. 1953). No such predicate exists in this case. Each estimate relied upon by the Owner as its only evidence as to the amount of damages contains indefinite sums.

The following facts render the amount and cause of damages uncertain:

1) The damages awarded include some amount for removal and patching of blisters in the material applied by Nationwide Painting Company; which sum is capable of determination but was not so determined by the owner.

2) The figure of $1.00 per square foot to cover the dome based on an approximate estimate.

3) The estimate of $5.50 per square yard for removal and replacement of acoustical plaster includes the sum of $2.00 per square yard. which is an unknown factor, which the estimator said he could not quote definitely, and an indefinite sum in the neighborhood of $3.50 to $4.00 for new plaster.

4) There was no showing that all of the acoustical plaster had to be removed.

5) The cause of the leaking is uncertain.

The inclusion of an amount of money to remedy a defect which was caused by Nationwide Painting Company alone renders the cause and the amount of dam-

age so uncertain as to require reversal of the judgment of the trial court and reversal of that portion of the judgment of the lower court affirming the trial court. The damages necessary to remedy the leaking and the damages necessary to remedy the blisters can be separated. The judgment of the lower court conflicts with the applicable law of the state of Florida and this court should exercise its discretion and grant certiorari. *Ruhlin v. New York Life Insurance Co.* (1938), 304 U.S. 202; 58 S.Ct. 860, 82 L.Ed. 1290.

CONCLUSION

Based on the foregoing authorities, this petition for a writ of certiorari to the Fifth Circuit Court of Appeals should be granted.

Respectfully submitted,

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PROOF OF SERVICE

I, ANTHONY S. BATTAGLIA, one of the attorneys for Respondents and Cross-Petitioners, HUNGERFORD CONSTRUCTION COMPANY and CONTINENTAL CASUALTY COMPANY, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the _____ day of September, 1969, I served a copy of the foregoing Brief of Respondents and Cross-Petitioners on the petitioner and cross-respondent by mailing a copy in a duly addressed envelope, postage prepaid, to its respective attorneys of record as follows: J. A. McClain, Jr., Esquire, of the firm of McCLAIN, TURBIVILLE & HELLER, 615 Marine Bank Building, Tampa, Florida, and to J. Hal Connor, Esquire, of the firm of SUMMERLIN, CONNOR & THREADGILL, P. O. Box 793, Winter Haven, Florida.

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IN THE

Supreme Court of the United States

October Term 1969

No. [redacted] 510

FLORIDA CITRUS EXPOSITION, INC.
also known as
FLORIDA CITRUS SHOWCASE INC.,
Petitioner,

vs.

HUNGERFORD CONSTRUCTION COMPANY
a Michigan Corporation; and
CONTINENTAL CASUALTY COMPANY
an Illinois Corporation,
Respondents.

CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

Brief of Respondents

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FREE PRESS PUB. CO., INC. - TAMPA

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an Illinois Corporation,
Respondents.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Brief of Respondents

Respondents respectfully pray that this Honorable Court deny the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on April 22, 1969.*

*Respondents will use the same references used by petitioner: "R____" refers to certified Transcript of Appendix used in the lower court.

"ST____" refers to certified Supplemented Transcript which contains all testimony except exhibits.

"A____" refers to Appendix to petition.

Petitioner will be referred to as "Owner"; Respondents will be referred to collectively as "Contractor".

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 410 F. 2d 1229.

QUESTION PRESENTED FOR REVIEW

WHETHER THE DECISION OF THE LOWER COURT IN A DIVERSITY CASE WHICH DISALLOWED AN AWARD OF LIQUIDATED DAMAGES UNDER CIRCUMSTANCES WHERE THE DAMAGES WERE CAPABLE OF PROOF AND WHERE THE LIQUIDATED DAMAGES WERE FAR IN EXCESS OF THE COMPENSATORY DAMAGES INDICATED FROM THE EVIDENCE CONFLICTS WITH THE APPLICABLE LAW OF THE SUPREME COURT OF THE UNITED STATES, THE DECISION OF OTHER CIRCUIT COURTS OF APPEAL ON HIS MATTER OR THE APPLICABLE LAW OF THE STATE OF FLORIDA.

STATEMENT OF THE CASE

The Contractor disagrees with certain portions of the statement contained in the Owner's petition and will limit this statement to what Contractor deems necessary to correct inaccuracies in the Owner's statement.

The building, the construction of which is the subject matter of this case, was to have several uses of varying importance.

The primary purpose for the building was to be a permanent home for a citrus festival held once a year during February or March. (R 66, 67; ST 405, 406) Petitioner has never been denied the use of the building. (R 56; 70-71; 82; ST 220, 412, 413, 485, 486)

The specific liquidated damages provision in the contract was included to indemnify the Owner in the event it did not have the building for its show. (R 66; 405)

In addition to the primary use, there were several secondary uses either intended or considerd. The building had an office section. This portion of the building was occupied within the time provided for by the contract. (ST 220; R 56)

Two additional secondary uses were considered. One was to charge a daily admission to the public to see the building. The Lower Court found that "this use did not rise above a suggested use." (A 21) The other use was to rent the building to others for exhibitions such as an auto show.

The Owner maintains that the jury awarded it $49,500.00 for correction of the leaks in the concrete dome and $28,250.00 as liquidated damages. This statement is inaccurate. The jury verdict was a total of $77,750.00 for the Owner. No allocation was made by the jury as to the portion relating to actual damages and the portion relating to liquidated damages. (R 16; ST 1039)

Additionally, the sum of $28,250.00 based on $250.00 per day for 113 days is unsupported. There is nothing in the record to support the figure of 113 days.

The starting date for the contract was August 17, 1964. (ST 426) By virtue of the contract, the original completion date would have been 180 days later or February 13, 1965. (R 427) However, the original completion date was extended. There was an agreed extension of 21 days resulting from a change in the foundation

for the building. (ST 120, 170) There was also an agreed extension of 2½ days for delays due to labor disputes. (ST 120, 170) These two extensions would leave the completion date at March 9, 1965. Adding 113 days to March 9, 1965 would leave a date of June 30, 1965.

In addition there was an additional nine days delay because of rain. (ST 120) The Owner did not agree to these delays. (ST 170)

There is an inaccuracy in the statement of Owner that it is approximately June 25, 1965 when the Owner and Contractor broke off negotiations. In closing argument, Owner states that negotiations were not broken off until November 12, 1965. (ST 980)

The contract provisions in question are as follows:

"4. TIME OF CONSTRUCTION: All work under this Contract shall be completed within 180 calendar days. If required in order to complete the work within the specified time, then such work as necessary shall be done after regular working hours, on Saturdays or holidays, as may be required, to complete same without additional cost to the Owner. *A penalty will be invoked for later completion. Details regarding these provisions are contained herein.* (emphasis supplied)

5. LIQUIDATED DAMAGES FOR FAILURE TO COMPLETE WITHIN THE TIME LIMIT. The amount of $200 (sic) per calendar day will be assessed as the fixed, agreed liquidated damages to be deducted by the Owner from the sums due under contract provisions for each and every calendar day of delay in completion of the work beyond the expiration time above specified and as provided." (R 161-162)

The Lower Court remanded the case for a new trial on the question of the damages sustained by Owner. (A 22) The remand is not limited to damages sustained by failure to complete, but all damages suffered by the Owner, without liquidated damages.

REASONS FOR DENYING THE WRIT

1. The decision of lower court will have no adverse effect on government contracts in the areas of national defense and outer space development.

The cases cited by the Owner in attempting to show a conflict between the decision of the lower court in this case and other decisions of this court defeats the first reason for granting the writ maintained by the Owner.

The government contracts which Owner refers to would be between the United States or one of its agencies and a contractor. The contracts would be pursuant to legislative authority granted by the Congress of the United States.

Both the majority and the two dissenting opinions in the case of *Priebe & Sons v. United States* (1947), 332 U.S. 407, 68 S.Ct. 123, 92 L.Ed 32, cited by Owner at Page 9 of the petition discuss the distinction between commercial transactions with the government in ordinary times and contracts pursuant to Congressional authority in other times. It is maintained that government contracts in the area of national defense and for outer space development are not ordinary commercial transactions like the construction of the building in question for a private, non-governmental corporation.

These distinctions therefore exist. The contract which is in question in the case at bar is not a government construction contract but is a private contract.

Secondly, the contract in question does not involve any extraordinary circumstances that would warrant applying any rule other than the rule to be applied to ordinary commercial transactions.

In addition, all the lower court in this case said was the damages in question were capable of proof and were disproportionate to the actual damages. Even the cases cited by the Owner involving government contracts in extraordinary circumstances would require opposite findings before liquidated damages would be allowed.

The case of *United States v. Bethlehem Steel Co.* (1906), 205 U.S. 105, 27 S.Ct. 450, 51 L.Ed 731, involved a contract made in preparation for the expected war with Spain. In that case the court found:

> ". . . The circumstances were such that it would be almost necessarily impossible to show what damages (if any) might or naturally would result from a failure to fulfill the contract . . ."
>
> 205 U.S. at page 121; 27 S.Ct. at page 456.

The court also found:

> ". . . The amount is not so extraordinarily disproportionate to the damage which might result from the failure to deliver the carriages as to show that the parties must have intended a penalty, and could not have meant liquidated damages . . ."
>
> 205 U.S. at page 121; 27 S.Ct. at page 456.

The foregoing findings are opposite in both instances from those in the present case.

From the foregoing, it is maintained that the decision below will not have any adverse effect on government construction contracts in the areas of national defense and outer space for the case below did not involve a government construction contract and, in any event, the lower court merely applied the existing law both as to private and government contracts.

2. The decision below is in harmony with the holding in the cases of this court cited by the Owner and there is no conflict between the decisions.

Prior to demonstrating the similarity or distinction between the present case and those cases of this Court or other United States Circuit Courts of Appeal, it should be noted that this is a case in which federal jurisdiction is invoked because of diversity of citizenship of the parties.

In *Ruhlin v. New York Life Insurance Co.* (1938), 304 U.S. 202, 58 S.Ct. 860, 82 L.Ed. 1290, in a case decided after the decision in *Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, this court said:

> ". . . As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts. The rules indicate that the court will be persuaded to grant certiorari where a Circuit Court of Appeals 'has decided an important question of local law in a way probably in conflict with applicable local decisions'. No such showing was attempted by the petition . . ."

304 U.S. at page 206; 58 S.Ct. at page 861.

As will be demonstrated hereinafter, the decision of the lower court does not conflict with the law of the State of Florida. Notwithstanding the foregoing, lack of any conflict is readily apparent from a reading of the cases cited by the Owner.

The case of *Sun Printing and Publishing Assoc. vs. Moore* (1902), 183 U.S. 642, 22 S.Ct. 240, 46 L.Ed. 366, supports the position taken by the Contractor and the lower court, that is, a stipulated sum of damages "for the breach of several covenants of varying degrees of importance . . . may well be held to be a penalty . . ." (Owner's brief at page 7)

In the present case whether the contract documents themselves are considered or the actual intentions of the Owner as testified to by the agents of the Owner are considered, the contract provisions provide for the same damages for breaches of varying degrees of importance.

The Owner indicates in its brief that the building was 27% incomplete at the end of the time period for construction. The jury, however, found that the contractor had substantially performed the contract for the jury was instructed that if the contract was substantially performed the Contractor was entitled to recover the balance of the original contract price that was unpaid. (R 128; ST 1014) The jury awarded the Contractor the balance of the original contract amount and the lower court affirmed the award to the Contractor.

The Owner maintains that the contract clause was for completion of the building. Clearly then the same amount of damages would apply to the failure to complete the entire building as would apply to the failure to completely furnish door knobs or to completely furnish

other insignificant items that would not and could not cost $250.00 for each calendar day they remained unfurnished.

The decision of the lower court on this issue is in harmony with the decision in *Bignall v. Gauld* (1886), 119 U.S. 495, 7 S.Ct. 294, 30 L.Ed. 294, where the court held a provision providing for $10,000.00 damages in the event of a breach of a covenant to discharge a total of $39,000.00 in indebtedness to several parties varying from more than $8,000.00 to less than $10.00 (provisions of varying importance because of the dollar amount in question) to be excessive.

There are other provisions in the *Sun Printing and Publishing Assoc.* case, supra, which would allow the Contractor to cite that case in support of the holding of the lower court and demonstrating that there is no conflict.

Initially, the contract provision was for the breach of one covenant and one covenant only, failure to return a yacht to its owner. The stipulated damage clause was not to cover partial destruction to the yacht for a security or guaranty was to be procured by the lessee of the yacht to cover the damage.

Secondly, in reaching its opinion, the court cited cases which provided that two conditions must occur before liquidated damages will be allowed.

1) the sum stipulated must not be disproportionate to the presumable or probable loss, and,

2) the loss must not be readily ascertainable.

[See *Ward v. Hudson River Bldg. Co.* (1891), 125 N.Y. 230, 26 N.E. 256, cited at 183 U.S. 668; 22 S.Ct. 251.]

The lower court in the present case found neither of the conditions were met and therefore it was correct in holding the contract provision to be a penalty.

United States v. Bethlehem Steel Co. (1906), 205 U.S. 105, 27 S.Ct. 450, 51 L.Ed. 731, has been discussed above. Here again, the finding by the lower court that the damages in the present case are "capable of proof" (A 21) and also "far in excess of . . . compensatory damages" (A 22) renders the decision of the lower court in harmony with the holding in *United States v. Bethlehem Steel Co.*, supra.

The same distinction is applicable to the case of *Wise v. United States* (1919), 249 U.S. 361, 39 S.Ct. 303, 63 L.Ed. 647. Here again, this court stated that if the damages are capable of proof or the stipulated damages are disproportionate to the actual possible damages, the court is justified in refusing to enforce a liquidated damages provision in a contract.

The decision in the *Wise* case, supra, also indicates that the parties considered the possibility that one of the two buildings in question might be completed and the second not. There is no such similar evidence in this case to relieve from the fact that the same amount of damages was to be assessed for complete or partial breach of the contract. Also, in the present case, the Owner had use of its building for its primary purpose within the allowed time. In the *Wise* case, supra, both buildings were delayed beyond the allowed time for completion.

The citation of the case of *Priebe & Sons v. United States* (1947), 332 U.S. 407, 68 S.Ct. 123, 92 L.Ed. 32, as in conflict with the decision of the Fifth Circuit Court of Appeals in this case is most interesting.

In that case this court reversed a decision of the Court of Claims which allowed the government to retain liquidated damages finding that the contract provision in question was a penalty. This court noted:

> ". . . But an exaction of punishment for a breach which could produce no possible damage has long been deemed oppressive and unjust . . ."

332 U.S. at page 413; 68 S.Ct. at page 127.

Additionally, as mentioned above, both the majority and both dissenting opinions discuss the difference between government contracts and private contracts.

It therefore appears that the ruling of the lower court in the present case complies with the test set down by this court on numerous occasions in determining whether or not a contract provision is a penalty and unenforceable or a provision for liquidated damages and enforceable. The facts in this case when applied to those tests warrant the finding of the lower court that the provision was one for a penalty.

3. The decision below is in harmony with the holdings in the cases of the other Circuit Courts of Appeal cited by the Owner and there is no conflict between the decisions.

Contractor maintains that the decision of other Courts of Appeal on the subject of liquidated damages are no different than those of this court and not in conflict with the decision of the Fifth Circuit Court of Appeals in this case.

In *United States v. LeRoy Dyal Co.*, 186 F.2d 460 (3 Cir. 1950), the court found its decision was controlled by the majority in *Priebe & Sons, Inc. v. United States*, supra (1947), 332 U.S. 407, 68 S.Ct. 123, 92 L.Ed. 32.

The contract in the *LeRoy Dyal Co.* case, supra, was a government contract, not a contract between private parties. The court specifically mentioned it was not applying state law (186 F.2d at page 461) as was properly done in the present case.

Nowithstanding the aforementioned distinctions, the *LeRoy Dyal Co.* case, supra, is in harmony with the decision in this case for the court stated the liquidated damages were "not an unduly large amount" and "not so high as to provide a penalty." (186 F.2d at page 463) In this case we have an opposite finding and the two decisions are not in conflict.

The same argument as applied above is applicable to the case of *Southwest Engineering Company v. United States*, 341 F.2d 998 (8 Cir. 1965). The court noted at the outset that the contracts "were entered into pursuant to federal law by an authorized federal agency" (341 F.2d at page 100). The court thereafter sets forth succinctly the same two requirements mentioned in all of the cases cited by Owner:

> ". . . First, the amount so fixed must be a reasonable forecast of just compensation for the harm that is caused by the breach, and second, the harm that is caused by the breach must be one that is incapable or very difficult of accurate estimation . . ." 341 F.2d at page 1001.

Failure to meet either one of these requirements would be sufficient to support a finding that the contract provision was a penalty in the present case. Neither of these two requirements have been met.

It therefore appears that there is no conflict between the decision in this case and the decisions of the other courts of appeal on the same matter cited by the Owner and the writ should be denied.

4. The lower court properly applied the applicable law of the State of Florida governing this contract.

The lower court in this case applied the law on this matter in *Pembroke v. Caudill* (1948), 160 Fla. 538, 37 So.2d 538, 6 ALR 1395, as recited by the Supreme Court of Florida which is the controlling law in this diversity of citizenship case.

This court has recently said:

". . . The issue presents solely a question of state law and '[w]e ordinarily accept the determination of local law by the Court of Appeals . . ."

C.I.R. v. Estate of Bosch (1967), 387 U.S. 456, 87 S.Ct. 1776, 18 L.Ed. 2d 886 at page 1781.

The *Pembroke* case, supra, reviewed the existing law of the State of Florida on the subject of liquidated damages citing numerous prior decisions. The Fifth Circuit Court of Appeals has in the past applied the law as enunciated in *Pembroke v. Caudill,* supra, in finding a provision to be one for a penalty. In *Hook v. Bomar,* 320 F.2d 536 (5 Cir. 1963), the court quoted "in extenso" from the decision in *Pembroke.* (320 F.2d 539-540)

The lower court in this case found the facts as compared to the tests in the *Pembroke* case, supra, indicated that the contract clause in question was a penalty and not one for liquidated damages.

Owner maintains that there was only one reason for invoking the clause in question—failure by the Contractor to deliver a completed building. This is contrary to the Owner's testimony for its agents said:

> ". . . The fee which we asked for lateness was to indemnify us if we had to put on our show and had no building to put it on in, after we had contracted to have a building . . ." (R 66; ST 405)

The show was held in the building.

At the time this contract was executed, there were numerous ways in which the building could be incomplete, each one of which would be capable of proof. The only incompletion that would not be capable of proof was if the building was incomplete to the point that the annual show could not be held in the building. This did not occur; the show was held inside the building when contemplated.

The case of *Southern Menhaden Co. v. How* (1916), 71 Fla. 128, 70 So. 1000, was considered by the court in the *Pembroke* decision, supra. The Florida court again makes reference to the two requirements, both of which must be met before a court will enforce a provision for stipulated damages:

> ". . . the actual damages sustained per day would be exceedingly difficult to ascertain, if not impossible to measure by any standard . . ."

70 So. at page 1004

> ". . . In such case we think that it was competent for the parties to stipulate for liquidated damages, especially where the amount agreed upon does not appear to have been so unreasonable as to suggest an intention of the parties to provide for a penalty . . ."

70 So. at page 1004

". . . The sum stipulated does not appear to be disproportionate to the probable damages that the complainant might have sustained . . ."

70 So. at page 1004

". . . there would be no doubt that damage would result equal to, if not in excess of, the amount stipulated . . ."

70 So. at page 1004

The Owner at page 11 of its petition acknowledges that the contract provision in the *Pembroke* case was found to be a penalty provision because the same amount of damages would be assessed if the buyer defaulted in any one of a number of minor particulars, including failure for one day to meet a payment on the balance due. The same facts appear in this case. The building was complete enough to allow the annual show to be held. The building was complete enough to allow the owner to occupy the office section of the building. The building was complete to the extent that none of the materials or items required by the construction contract to be installed were omitted—the only damages awarded were for corrections to items already installed not for the omission of any items. The comparison to the *Pembroke* case, supra, seems inescapable.

The Owner seems to distinguish the *Pembroke* case, supra, because it involved a lease and not a construction contract. The landmark decision relied upon by Owner as creating an alleged conflict, *Sun Printing and Publishing Assoc. v. Moore,* supra, also involved a lease.

The Owner says at pages 11-12 of its petition:

> ". . . In construction contracts, the Florida Supreme Court, as shown by the *Menhaden* decision, supra, upholds liquidated damage provisions because of the uncertainty of damages in the event of failure to complete construction on time . . ."

In the present case, there was no uncertainty of damages. (A 21)

CONCLUSION

Whether the construction contract in question is considered, or the testimony of the Owner's agent regarding the purposes or uses for the building and reason for including a "fee for lateness" is considered, the following appears:

1) The contract provision for damages at the rate of $250.00 per day was the same for total breach or breach of any one of a number of particulars of varying degrees of importance.

2) The loss, if any, was capable of actual proof.

3) The sum of $250.00 per day was far in excess of the actual loss, if any, suffered.

All of the cases cited indicate in these circumstances the contract provision is a penalty and not a provision for liquidated damages. The Fifth Circuit Court of Appeals was correct in its application of the law as enunciated by the Supreme Court of Florida and its decision is in harmony with prior decisions of this court and other circuit courts of appeal on this matter.

For each of the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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PROOF OF SERVICE

I, ANTHONY S. BATTAGLIA, one of the attorneys for Respondents, HUNGERFORD CONSTRUCTION COMPANY and CONTINENTAL CASUALTY COMPANY, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the _____ day of September, 1969, I served a copy of the foregoing Brief of Respondents on the petitioner by mailing a copy in a duly addressed envelope, postage prepaid, to its respective attorneys of record as follows: J. A. McClain, Jr., Esquire, of the firm of McCLAIN, TURBIVILLE & HELLER, 615 Marine Bank Building, Tampa, Florida, and to J. Hal Connor, Esquire, of the firm of SUMMERLIN, CONNOR & THREADGILL, P. O. Box 793, Winter Haven, Florida.

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